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No. 87-481

In the Supreme Court of the United States

October Term, 1987

JAMES H. LYONS,
Petitioner,

vs.

HONORABLE JAMES W. JACKSON, JUDGE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The decision rendered by the United States Court of Appeals for the Sixth Circuit in this matter does not conflict with the decision of any other federal court of appeals on the same issue.

This Court has already once denied certiorari to the Lake County Court of Appeals in this matter, wherein petitioner raised virtually the same issues as are presently before the Court. *Lyons v. Ohio,* 471 U.S. 1101 (1985).

STATEMENT OF THE CASE

Respondent has no objection to the Statement of the Case as set forth by petitioner at pp. 2-6 of his Petition for Writ of Certiorari in the instant matter.

REASONS FOR DENYING CERTIORARI

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not prohibit a second trial where the first jury, having deliberated for nearly four (4) hours after receiving a modified Allen charge in which they were instructed to continue deliberating as long as there was a possibility of reaching a verdict, notifies the trial judge that they are unable to reach an agreement, and the trial judge, without questioning the jurors further, declares a mistrial and discharges the jury.

Defendant-Petitioner argues that the trial court's failure to thoroughly question the jury, either individually, as a group, or through their foreman, with regard to the possibility of reaching a verdict through further deliberations, before declaring the jury deadlocked and ordering a mistrial, was a violation of his constitutional rights. This argument is without merit, being supported by neither facts nor law.

It is well-settled that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is not an absolute bar to retrial in every case, and that a defendant may be retried where a "manifest necessity", a classic example of which is a deadlocked jury, exists to declare a mistrial in his initial prosecution. *United States v. Perez,* 22 U.S. (9 Wheat) 579, 580 (1824); *Arizona v. Washington,* 434 U.S. 497, 505-506 (1978); *United States v. Sanford,* 429 U.S. 14, 16 (1976); *Jones v. Hogg,* 732 F.2d 53, 54 (6th Cir. 1984); *United States v. Brown,* 677 F.2d 1174, 1178 (6th Cir. 1980).

The standards for determining whether a mistrial is properly declared are found in *Arizona v. Washington, supra.* The Court in *Arizona* delineated two levels of scrutiny, based on the way that a mistrial can come about.

> [T]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.

434 U.S. at 508.

The mistrial in the case at bar was not based on the unavailability of prosecution evidence, nor is there any evidence to suggest that the prosecutor is attempting to harass the defendant. Instead, the mistrial in this case clearly fits within the Court's second category, that is, "the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." *Id.* at 509.

A much less stringent level of scrutiny is used in reviewing these types of mistrials. The *Arizona* Court stated that:

> In this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal.' *But if he failed to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from the pressures inherent in the situation rather than the considered judgment of all jurors . . . the trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.*

(Emphasis supplied). *Id.* at 509-510.

Despite this standard of deference, petitioner urges this Court to find that the trial court was obligated to question each juror individually as to the possibility of their reaching a verdict. As the Court of Appeals correctly noted, however, the determination of whether a jury is genuinely deadlocked and a mistrial declaration necessary is a case by case determination, based on the totality of the circumstances involved in each case. *See United States v. Gordy*, 526 F.2d 631 (5th Cir. 1976); *Jones v. Hogg*, 732 F.2d 53, 55 (6th Cir. 1984); and cases cited therein.

> [T]he guiding principles of the *Perez* decision . . . command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula.

United States v. See, 505 F.2d 845 (9th Cir. 1974) [quoting *Wade v. Hunter*, 336 U.S. 684, 691 (1949)].

The question then, in a habeas review such as the case at bar, becomes one of whether, under the circumstances of the particular case, the trial court abused its discretion in finding that a "manifest necessity" for the declaration of a mistrial existed at the time it was declared. In order to make such a determination, a reviewing court must consider a number of important factors. *See Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978); *United States v. See, supra; Jones v. Hogg, supra.*

The Sixth Circuit Court of Appeals' opinion in *Jones v. Hogg, supra*, contains the most comprehensive, though not all-inclusive, judicial compilation of such factors, to date, and serves to illustrate the importance of considering the individual circumstances of each particular case before making such a determination. They include:

> (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot reach a verdict; (3) the length of the jury deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communication which the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional prosecutions will result in continued hung juries.

(Citations omitted). 732 F.2d at 56.

Applying the *Hogg* guidelines to the particular circumstances of the case at bar, it is apparent that the following factors collectively justified the trial judge's declaration of a mistrial: (1) this was only a three and

one-half day trial; (2) the issues were not particularly complex; (3) the jury had already deliberated for thirteen and one-half hours over a three-day period; (4) the jury had been given the following modified *Allen* charge:

> If you decide that you cannot agree and that further deliberations will serve no useful purpose, you may ask to be returned to the courtroom and report that fact to the Court. *If there is a possibility of reaching a verdict, you should continue your deliberations.*

(Emphasis supplied); (5) petitioner did not object to the *Allen* charge; (6) the jury deliberated a total of nearly four more hours after receiving the *Allen* charge; (7) the jury subsequently notified the court that it was unable to reach agreement on either count; (8) petitioner's counsel agreed with the court that the jury was hung.

Moreover, after receiving the jury's communication that they could not reach an agreement, the trial judge called the entire jury back into open court and asked the foreman whether they were, in fact, deadlocked. The foreman answered that they were, and no other juror expressed any disagreement, objection or discomfort with the foreman's assessment. Thus, the circumstances indicated that the foreman was speaking for the entire jury in his representative capacity, and the trial judge, who was in a position to observe the demeanor and expressions of the other jurors was justified in so concluding. *See United States v. Larry*, 536 F.2d 1149, 1153 (6th Cir. 1976), *cert. denied*, 429 U.S. 984 (1976).

Petitioner's blanket statement, at page 9 of his Petition in this matter, that considerable conflict and uncertainty exists "among the circuits on the proper stan-

dard for determining when, or if, a jury is genuinely deadlocked" is totally unsupported in law.

First, only two of the cases cited involved the declaration of a hung jury following an *Allen* charge, and both are distinguishable on their facts from a case such as the one at bar, where, after being specifically told to continue their deliberations if the *possibility* of reaching a verdict existed, the jury, following four (4) more hours of deliberation, on its own initiative, informs the court that it cannot agree on either count.

Second, the other authorities to which petitioner cites demonstrate no conflict among the circuits with regard to the ultimate issue: ascertaining the *possibility* of reaching a verdict through questions to the jury, either directly or through its foreman, where no *Allen* charge has been given prior to such questioning.

Among the cases cited by petitioner as supportive of his ill-founded conclusion that confusion reigns with regard to the proper standard for determining if, and when, a jury is genuinely deadlocked, only *United States v. Horn,* 583 F.2d 1124 (10th Cir. 1978), and *United States v. Lansdown,* 460 F.2d 164 (4th Cir. 1972), involve the giving of an *Allen* charge prior to declaration of a mistrial.

The *Horn* court found that the mistrial declared in that case was improper because it had been declared *sua sponte* by the district court without any further communication from the jury regarding the *possibility* of its reaching a verdict.

Similarly, the *Lansdown* court reversed the district court's denial of defendant's motion to dismiss on double

jeopardy grounds because that court had *sua sponte* declared a mistrial *despite* communications from the jury foreman that there remained a distinct *possibility* that the jury would reach a verdict if allowed to deliberate further.

Both of these cases are clearly distinguishable from the case at bar, where the trial court took much more care in determining whether the *possibility* of reaching a verdict existed prior to declaring a mistrial. The jury was instructed to continue its deliberations as long as the *possibility* of reaching a verdict remained. Thereafter, the jury, through its foreman, notified the court that it could not reach an agreement on either count. In view of all of the circumstances that preceded that communication to the court, the court was clearly justified in declaring a mistrial on the grounds that the jury was *hopelessly deadlocked.* And, as the court stated in *United States v. See, supra,* "the 'crucial factor' in determining the probability of agreement is a statement from the jury that it is 'hopelessly deadlocked'." 505 F.2d at 851 (quoting *United States v. Lansdown, supra* at 170).

Petitioner next asserts that since the trial court knew of the jury's unannounced "verdict" on Friday, the court had strong evidence that the jury was not truly hung, and thus, should have made further inquiry as to the jury's activity on Friday. This argument is deficient in several respects.

First of all, the only evidence the trial court had before it on Monday was that the jury had deliberated for thirteen and one half (13½) hours over three (3) days and reported that they could not reach an agreement on either count. The "agreement" on Count One

had been reached on Friday. After the reporting of this "agreement" and the resulting occurrences, the jury returned to deliberations on Friday. They were then excused for the weekend and resumed deliberations on Monday morning. So, sometime between 4:00 p.m. Friday and 11:45 a.m. Monday, as a result of the deliberations process and the passage of time, the agreement on Count One dissipated, and the jury found itself unable to agree on either count.

Jurors can and do change their minds. The trial judge was not required to speculate as to how many jurors had changed their minds, or on the deliberations process. All that he was required to do was act on the only objective evidence he had before him—the length of the deliberations and the jury's statement that they could not agree. The trial court concluded that the jury was deadlocked and dismissed them. This decision was supported by the surrounding circumstances and was clearly within the court's discretion.

The fact that the jury may have reached a tentative agreement on one count of the two-count indictment does not impose any duty on the trial court to make any inquiries, since the jury instructions clearly stated to the jury that they were not required to agree on a verdict *on each* of the counts.

The jury instructions made it clear that the two (2) counts in the indictment were separate and distinct and that a finding on one count should not influence their finding on the other count.

It is clear, therefore, that any tentative agreement which was not put into writing by the jurors, was not binding on any juror, the court, nor the prosecution. This

standard was concisely set out in *McKay v. Raines,* 405 F. Supp. 363 (1975). In *McKay,* the defendant sought to introduce jury affidavits to show that the jurors had reached a tentative agreement as to one of the counts in the multi-count indictment where the original trial resulted in a hung jury. The court made it quite clear that a jury's decision is not final until it is presented to the court, has been accepted by it, and has been assented to by the jury.

> Until such time jurors are not bound by votes or decisions in the jury room and remain free to register dissent up to the time the verdict is *recorded.* Deliberations not having been completed, no jeopardy attached which would bar a second prosecution should a mistrial be declared. . . . the affidavits themselves indicate that the jury merely made a *preliminary determination* of the second degree murder charge in the course of its discussion. *This was not binding on any juror, the court, nor the prosecution.*

(Emphasis added). *Id.* at 365.

Thus, the jury in this case was instructed that they were to consider each count separately and come to a verdict on each, in writing, before announcing it in open court. The jury did not ask for any clarification or further instructions on this matter, and upon returning from deliberations, they announced that they could not reach an agreement on either count. Under these circumstances, the judge was not obligated to make any further instructions, nor was he authorized to make any inquiries of the jury regarding its failure to agree.

In *Smith v. Commonwealth,* 321 S.W.2d 786 (Ky. Ct. App. 1959), the court cautioned against the possible dangers of a trial judge improperly influencing an apparently dead-

locked jury by what he says to them. The court stated that:

> [i]t behooves a trial judge to be most careful in what he says to a jury when it appears that body may be hung and he seeks to have them reach a verdict. . . A presiding judge should never inquire, or let the jury inform him, how it stands when it is apparently hung. *Id.* at 789.

Similarly, in *State v. Middleton*, 63 S.E.2d 163 (S.C. 1951), the court found that a trial judge had committed prejudicial error in inquiring about the jury's standing. Again, wary of the possibility of the trial judge improperly influencing the jury, the court found that "it is improper [for the trial judge] to make the jury publicly reveal their standing in regard to the conviction or acquittal of the accused." *Id.* at 165.

Despite the suspicion and disfavor with which a trial judge's inquiries of a hung jury are viewed, petitioner contends that the trial judge acted improperly in not inquiring if a verdict on the first count had been reached on Friday. Clearly, though, given the fact that the jury had reported it was deadlocked, and given the judicial admonitions against such questioning, the court should not and could not have made such inquiries. It is also evident that because the court had instructed the jury to consider each count separately, and because there is no evidence that the jury expressed any confusion to the court, an additional instruction regarding a partial verdict was not required.

The jury's declaration that no agreement had been reached on either count, and their failure to reach any type of true verdict, were the only facts before the trial

judge when the decision to discharge the jury was made. Because the jury, by its own admission, could not reach an agreement after considerable deliberation, the court did not act improperly in discharging them and declaring a mistrial.

Thus, there was a substantial amount of supporting evidence on which the trial judge could have based his decision to exercise his discretion in dismissing the jury. The Sixth Circuit Court of Appeals reviewed these factors and affirmed that the trial court had not abused its discretion. The State submits that, under the circumstances here, this is the only possible conclusion.

This case does not present the type of close question which merits the attention of this court. Nor does this case represent the type of case which can be used to create judicial standards for future decisions. Determinations such as this must be made on a case by case basis, because whether the trial court acted properly depends on the facts and circumstances peculiar to each case. As such, it would be "impossible to define all the circumstances which would render it proper to interfere." *See,* at 850.

Since it would be impossible to define all of these circumstances, it would be equally impossible to set out an abstract formula which could be mechanically applied in each and every case. *See,* at 851. The best that can be done is to set out general guidelines, and factors or circumstances which might be considered in determining whether a mistrial is necessitated. The general guidelines, however, have already been set out by the United States Supreme Court in *Arizona v. Washington, supra,* and have been followed in the other cases to which petitioner cites. Likewise, relevant factors or circumstances have also been

established, e.g., length of deliberations, failure to object, jury's statement that it is hung, by numerous decisions, including those cited herein.

Because there is ample evidence pointing to the conclusion that there was no abuse of discretion in the case at bar, and because the exact circumstances present here will never be repeated, this case does not represent the type of case which could be used as a vehicle for the formation of constitutional principles to be applied in future cases. As such, this case is not of the type which merits this court's review.

In addition, a finding that the trial judge in this case abused his discretion would serve to defeat the ends of justice. In reviewing a trial judge's decision to declare a mistrial, it is important to realize that:

> [t]he trial judge must balance the defendant's 'valued right to have his trial completed by a particular tribunal,' with Society's interest in just judgments and the conservation of judicial resources.

See, at 851 [quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)]. As a result of this balancing process:

> A defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Wade, at 689.

Not only are society's interests often protected by dismissal of a deadlocked jury, but the defendant's interests are also served by this action in many cases. *See*, at 851.

> Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts.

United States v. Goldstein, 479 F.2d 1068 (2nd Cir. 1973).

Because of these considerations then, the decision of the trial judge, when supported by relevant evidence, should not be set aside. Doing so would cause trial judges to feel obligated to pressure juries into deliberating until a verdict is reached, even where, as here, a jury states that they are unable to reach an agreement after many hours of deliberations, the trial judge ascertains that this is in fact the case, and the defendant concurs in this assessment. Hence, the overturning of a trial judge's amply supported, discretional decision, as is present here, would only defeat the public's, as well as, the defendant's interest in "fair trials designed to end in just judgments." *Wade,* at 689.

The State, therefore, respectfully submits that petitioner's demand for Writ of Certiorari in this matter must be denied.

CONCLUSION

Under the circumstances present in the case at bar, the trial court clearly exercised sound discretion in finding the jury deadlocked, and in then declaring a mistrial. As the United States Supreme Court stated in *Gori v. United States,* 367 U.S. 364 (1961):

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such

> a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.

Id. at 368.

In view of this holding as well as the other holdings cited herein, the State would finally submit that a barring of the re-trial of petitioner in this matter would be to "deny the state its right to one full and fair opportunity to convict those who have violated its laws. *Arizona v. Washington,* 434 U.S. 497, 509 (1978)." *Ohio v. Johnson,* 467 U.S. 493, 502 (1984).

For all of the foregoing reasons then, respondent respectfully requests that this Honorable Court deny petitioner's demand for Writ of Certiorari.

Respectfully submitted,

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